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No. 88-

In The

Supreme Court of the United States

October Term, 1988

Reginald Poole,
Petitioner

v.

United States of America,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

# PETITION FOR A WRIT OF CERTIORARI

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## Questions Presented

1. Whether a Public Defender, without her client's knowledge or consent, has the authority to "stipulate to" an element of a criminal offense prior to trial, thereby waiving a panoply of the defendant's Fifth and Sixth Amendment Rights.

2. Whether the trial judge may eliminate the government's burden of proving elements of a criminal offense charged in the indictment by instructing the jury to disregard those elements, even with the implied consent of the Public Defender, under the Fifth Amendment's Due Process and Grand Jury clauses.

3. Whether a defendant's Sixth Amendment Right to Counsel is satisfied by the physical presence at sentencing of a lawyer who is neither appointed nor retained so that no attorney-client

relationship exists.

4. Whether a habeas corpus petitioner is entitled to an evidentiary hearing to determine whether the Public Defender's prejudicial refusal to challenge obvious trial and sentencing errors was negligent or strategic and whether an alleged off-record waiver actually occurred.

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## OPINIONS BELOW

The opinion of the court of appeals affirming the denial of petitioner's Motion to Vacate Sentence pursuant to 28 U.S.C. 2255 (App. A., infra) is reported at 832 F.2d 561.

## JURISDICTION

The Judgment of the court of appeals

(App. B., infra) was entered effective November 19, 1987 and issued as a mandate on February 5, 1988. The court of appeals' order denying a Petition for Rehearing and Suggestion of Rehearing In Banc (App. C., infra) was entered on January 13, 1988. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth and Sixth Amendments to the United States Constitution provide, in relevant part, as follows:

"Amendment V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law . . ."

"Amendment VI: In all criminal prosecutions, the accused shall enjoy the

right to a speedy and public trial, by an impartial jury . . . to be confronted with the witnesses against him, . . . and to have the Assistance of Counsel for his defence."

## Statement

1. Petitioner, Reginald Poole ("Poole"), was indicted by a federal grand jury on September 6, 1984, on four counts of bank robbery and assault in commission of the four robberies, in violation of 18 U.S.C. 2113 (A) and (D) (R. I-8) (References are to the appendices to this petition and to the record in the court of appeals). The Court appointed the Public Defender for the Northern District of Georgia to represent Poole (App. A-6).

The four counts of the indictment were tried together before a jury on November 26-28, 1984 (R. III-2). The jury returned guilty verdicts on all four

counts (App. A-2). On January 15, 1985, the district court sentenced Poole to 20 years imprisonment concurrently on the first three counts and five years probation, to run consecutively, on the last count. The sentence also requires Poole to make restitution in specific amounts to the respective bank victims on each of the four counts (R. III-93) (App. A-3).

The Court "relieved the Public Defender of the duty of representing" Poole in an order signed and filed on December 27, 1984, and did not appoint a replacement counsel until January 16 (App. A-3), so that Poole no longer was represented by appointed counsel at sentencing on January 15; the Public Defender, however, physically appeared at his sentencing (R. I-92; App. A-6), because, as she acknowledged at

sentencing, she had three other sentencings scheduled in the same courthouse on the same day.

On September 6, 1985, the court of appeals on direct appeal affirmed Poole's convictions and sentences in an unpublished order without any opinion but delayed releasing its mandate. Nevertheless, with the mandate not yet issued, on October 29, 1985, Poole filed a Petition for A Writ of Certiorari to review the unpublished Order, which this court denied on January 21, 1986.

2. On March 21, 1986, Poole, acting pro se, filed a Motion to Vacate Sentence pursuant to 28 U.S.C. 2255, raising, among other questions, the issues identified in this petition, and requesting an evidentiary hearing (R. I-5-9). On March 31, 1986, the District Court issued an order summarily denying the 2255

Motion (App. D-1; R. I-9-9). The Court held no evidentiary hearing and made no findings. On April 7, 1987, Poole, still acting pro se, filed a Motion for reconsideration in the District Court and a Motion for the District Court's required findings of fact and conclusions of law (R. I-12-9).

On September 2, 1986, the District Court issued an order denying (App. D-2; R. I-21-11) Poole's reconsideration Motion. Poole then filed a notice of appeal to the court of appeals. Petitioner was denied I.F.P. status and appeared pro se before the court on brief, although the undersigned presented oral argument pro bono publico. The court released an opinion which affirmed the denial of Poole's 2255 Motion on November 19, 1987 (App. A) and denied a Petition for in banc rehearing on January 13, 1988

(App. C). This Petition follows.

3. During Poole's trial, the prosecutor stated to the Court that the Public Defender had agreed prior to trial to an evidentiary stipulation or waiver regarding the federally-insured status of the victim banks (App. A-7; R. III-32). The record below contains no written stipulation or waiver, and the prosecutor's unilateral claim was not assented to by defense counsel or defendant (R. III-33). Poole later submitted an affidavit attesting that he was not aware of and did not consent to any such off-record stipulation.

Subsequently, the trial judge instructed the jury not to consider or make findings on three elements of the bank robbery offense: that the banks were federally insured at the time they were robbed, that money was taken from the

victim banks, and that the taking was by force and violence (App. E.; R. III-254).

During jury selection, Poole, as alleged in affidavits supporting his 2255 application, had complained to the Public Defender about the relatively small percentage of blacks in the jury pool, especially for Atlanta; he further complained about the prosecutor's obvious use of his peremptory strikes to eliminate blacks from the petit jury and asked the Public Defender to object. She refused. Poole foresaw that his fate ultimately would depend upon the jury's resolution of a swearing contest between his own black alibi witnesses and the government's white identification witnesses. With respect to two of the four bank robbery counts, the government's evidence consisted solely of the uncertain identification testimony of a single witness ("he may be the robber,

but I'm not sure") (III-37).

On appeal, the government did not seriously contest the fact that the restitution order in Poole's sentence violated 18 U.S.C. 3651, 3579(4)(E)(1) and 3580, because Poole was ordered to make restitution in excess of the victims' loss, to victims who presumably have been repaid, and without the required hearing. The government, moreover, did not contest that the sentencing proceeding violated Rule 32(C)(3)(D), F.R.Cr.P. (defendant's numerous challenges to the accuracy of the pre-sentencing report brought no response by the judge). The Public Defender raised no objection to the illegal restitution Order or sentencing proceeding (and had not read Poole's pre-sentence report at all).

4. This petition raises four questions, two of which are directly

addressed by the Court of Appeals and two which the Court addresses only indirectly (but which were separately briefed and argued below). The first issue briefed and argued to the Court below (question 4 herein) -- denial of an evidentiary hearing to resolve material factual disputes in a habeas corpus proceeding -- is not directly addressed by that Court.

The issue is appropriately before this Court, however, because the court of appeals disposes of it in footnotes 2, 3, 4, and 5 of the opinion. The opinion speculates that: (i) the public defender's failure to challenge the illegal restitution order and illegal sentencing proceeding, which is unexplained on the record, was not negligent but rather constituted "reasonable tactical decisions" (App. A-5, fn. 3); (ii) the "expectation" was that

the Public Defender would remain defendant's counsel through sentencing, even though she was removed formally several weeks earlier (App. A-5, fn. 2); (iii) the Public Defender "did not know the status of appellant's Motion to substitute counsel" (App. A-6), even though the order resolving that Motion had been filed in the Court in which she regularly appeared several weeks earlier; (iv) the Public Defender actually did stipulate, prior to trial, off-the-record, and without notifying Poole, to the federally-insured status of the victim banks (App. A-7); and (v) the Public Defender's refusal to raise a Swain v. Alabama, 380 U.S. 202 (1965) objection to the prosecutor's acknowledged use of peremptory strikes to eliminate blacks from the jury, in response to Poole's specific request, was not ineffective,

because a Swain challenge would have been difficult to prove, and Batson v. Kentucky, 476 U.S. 79 (1986), was not decided until the instant case was on direct appeal (Batson was relied upon in petitioner's direct appeal brief, to which the court of appeals did not respond, affirming Poole's conviction without any opinion) (App. A-16).

The court of appeals does not directly address the second question raised by this petition -- whether the trial Court's jury instructions (App. E) violated the Due Process clause by eliminating elements of the bank robbery offense (thereby also amending the indictment) without the defendant's consent. That issue was separately briefed and argued on direct appeal and on appeal from the denial of 2255 relief. This question is appropriately before this

Court because it is necessarily intertwined and will be presented together with question one: assuming arguendo that a defense counsel may orally "stipulate" to an element of the offense without defendant's consent, does that stipulation allow the Court to later instruct the jury to totally disregard that element (in this case, those elements).

The opinion below directly responds to two issues (questions one and three herein). The Court holds that a defense counsel validly may waive, through a stipulation prior to trial, a defendant's right to challenge an element of a criminal offense, without the defendant's knowledge or consent (App. A-7, 14). The Court thus specifically holds that Justice White's concurring opinion in Henderson v. Morgan, 426 U.S. 637 at 650 (1976) "is clearly not the law" (App. A-8) or "taken

in context, does not support appellant's position" (App. A-9, fn. 6). The Court so holds, even while recognizing that such a waiver implicates defendant's Fifth Amendment due process and Sixth Amendment jury trial and confrontation rights (App. A-7), because the stipulation to a supposedly "easily proven" element of an offense is a "tactical decision" (App. A-13). The Court then recognizes that bank robbery convictions in a number of cases have been reversed for failure of proof of that very element (App. A-14).

The Court also directly holds that Poole "was represented by counsel at sentencing" (App. A-7), even though the Public Defender's appointment had been formally terminated several weeks earlier (App. A-5, fn. 2), so that Poole had no attorney-client relationship with anyone at sentencing. The Court's rationale is

that the Public Defender's physical presence at Poole's sentencing was sufficient to satisfy the Sixth Amendment, because, according to the Court, the District Court "was not conscious of" having terminated the Public Defender as Poole's Counsel prior to sentencing (App. A-5).

Reasons For Granting The Petition

The questions presented by this petition place in issue the Constitutional role played by a government official, the Public Defender, in criminal trials, and the respective roles of the Grand Jury in defining the charge and the petit jury as a fact-finding body. The court of appeals' decision is not consistent with fundamental Fifth and Sixth Amendment principles established by this Court and generally recognized by the lower courts. The opinion below carries to unintended

extremes dicta in such recent decisions by this Court as Jones v. Barnes, 103 S.Ct. 3308 (1983); Morris v. Slappy, 103 S.Ct. 1610 (1983); and Taylor v. Illinois, 108 S.Ct. 646, 657 (1988). Finally, the decision of the Court of Appeals, in authorizing the trial court to totally eliminate the government's burden of proving the federally-insured status of the victim banks in its jury instructions, conflicts directly with Stirone v. United States, 361 U.S. 212 (1960), as reaffirmed in United States v. Miller, 471 U.S. 130 (1985), and with a recent decision by the Sixth Circuit, which reversed a bank robbery conviction on the basis of similar burden-eliminating instructions. United States v. Mentz, F.2d (6th Cir. 1988).

1. The court of appeals holds that it "is clearly not the law" that the

Public Defender lacks independent control to waive "the government's burden of proving an element of the offense," thereby waiving "a defendant's right to a jury trial on that element of the offense," without the defendant's knowledge or consent (App. A-7). The holding also implicitly allows a defense lawyer, without the defendant's consent, to approve a "burden-eliminating" jury instruction which amends the indictment.

The court, however, cites no authority to support its conclusion regarding what the law "clearly" is, referring generally to its own dicta that if a decision is labelled "strategic," App. A-7, or "tactical," App. A-13, then the defendant's consent or informed waiver is not required. The question thus presented for this Court is whether a criminal defendant has control over any

"strategic" or "tactical" decisions regarding his defense.

The court of appeals' decision is over-broad and cannot be squared with long-standing precedent, for virtually every decision in a criminal proceeding -- including the decision to plead guilty or go to trial, to seek trial by jury or by judge, and to present a defense -- is strategic or tactical. Yet, the defendant, himself, has the personal right to make each of those "tactical" decisions -- a Public Defender cannot "stipulate" them away, Taylor v. Illinois, 108 S.Ct. at 657, fn. 24. In other words, whereas this Court in Taylor rejected the premise that a defendant can control every tactical decision, the Court below holds that a defendant cannot control any tactical decision, once labelled "tactical."

The governing rule for evidentiary stipulations, with which the lower Court's decision is in conflict, is set forth by the Sixth Circuit in Wiley v. Sowders, 647 F.2d 742, at 649 (1981): an attorney may not stipulate facts which amount to the functional equivalent of a guilty plea, unless the defendant unequivocally understands the consequences of the admission.

Nor was lawyer control of the decision-making in this case required by trial exigencies -- a possibility which concerned this Court in Taylor, supra: the prosecutor specifically argued to the court of appeals, orally and on brief, that his alleged agreement with the Public Defender to enter into the alleged stipulation and waiver occurred during a telephone conversation several days prior

to trial.[1] Assuming that such a discussion occurred, the Public Defender could have sought the consent of the defendant to the waiver prior to trial, as she did seek consent at trial to a stipulation to a verdict by fewer than 12 jurors (R. III-11-12; I-83).

The question is not whether such a waiver of rights is "wise" or "tactical" but who, in our Constitutional system, has the right to make the decision.

The court of appeals' decision repudiates this Court, as well as the Sixth Circuit. Justice White wrote, in Henderson v. Morgan, 426 U.S. 637, at 650, that, "no matter how strong the evidence

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[1] The Court rebuffed Poole's complaints about such an off-record argument on direct appeal, as the recording of the oral argument reveals; cf. Stearns v. Hertz Corp., 326 F.2d 405, 408 (8th Cir. 1964, Blackmun, J.) ("the appeal is to be determined upon the record below").

... It cannot be 'harmless error' wholly to deny a defendant a jury trial on one or all elements of the offense with which he is charged. Similarly, it is too late in the day to permit a guilty pleas to be entered against a defendant solely on the consent of the defendant's agent -- his lawyer."

However, even if, notwithstanding Henderson, this Court believes that a defense counsel can agree not to challenge an element of the offense without defendant's consent, the trial judge still may not eliminate that element by instructing jurors to disregard it, without defendant's explicit waiver of Fifth Amendment protections. In Rose v. Clark, 106 S.Ct. 3101, at 3106, 3107, fn. 8 (1986) this Court noted that while a "burden-shifting" evidentiary presumption contained in a jury instruction,

challenged under Francis v. Franklin, 105 S.Ct. 1965, at 1970 (1985), could be harmless error, the complete withdrawal of an element from the jury, under the Due Process Clause, could not be; yet, the instruction in this case was "burden-eliminating," contrary to Rose v. Clark (App. E; R. III-254). The Sixth Circuit, consistent with the dicta in Rose v. Clark, has just reversed a bank robbery conviction because, under the Due Process clause, the jury instructions did not adequately require the jury to find that the bank victims were federally-insured, United States v. Mentz, F.2d (Feb. 22, 1988). The Eleventh Circuit recently recognized that jury instructions which change or eliminate an element of the offense charged in the indictment violate the Fifth Amendment's Grand Jury protection, United States v. Fitapelli,

786 F.2d 1461, at 1463-64 (1986).

The court of appeals recognized that other courts, like the Sixth Circuit in Mentz, supra, unanimously have "held that proof of federally-insured status is not a mere formality and is an essential element of the federal offense charged" (App. A-14). The Court must have concluded, therefore, that Justice White's language in Henderson was partially dicta (which, of course, it was) and an erroneous statement of the law (which it was not).

This Court held as early as Patton v. United States, 281 U.S. 276, at 312 (1930), that before a stipulation which waives the Sixth Amendment jury right can become effective there must be an "express and intelligent consent of the defendant" on the record, because the "maintenance of the jury as a fact-finding body in criminal cases is of importance and has a

central place in our tradition." In Brookhart v. Janis, 384 U.S. 1 (1966), this Court held that defense counsel could not, consistent with the Due Process Clause, enter an agreement, without the defendant's informed consent, not to contest elements of the offense once the prosecutor has proved a prima facie case.

Finally, this Court held, in Stirone v. United States, 361 U.S. 212 (1960), reaffirmed in United States v. Miller, 471 U.S. 130, at 139-140 (1985), that a trial judge, in jury instructions, could not amend or delete material averments in the indictment, consistent with the Fifth Amendment's Grand Jury provision, even with the implied consent of the defendant's lawyer -- yet the trial judge did just that in this case (App. E).

In the current case, to repeat, relying upon the alleged waiver, the trial

Court instructed the jury to totally disregard three elements of the offense, without the defendant's informed consent. Such an instruction is not merely "burden-shifting" but rather is "burden-eliminating," in violation of the Due Process Clause, and amends the indictment, in violation of the Grand Jury Clause.

Deleting even an "easily proven" element of a criminal offense amounts to re-writing the criminal statute or amending a criminal indictment -- actions which only the legislature or the Grand Jury can take. Or it amounts to a partial guilty plea and consequent denial of the right to jury trial, to which only an informed defendant can consent, even if it is "tactical" and "wise" to do so. A holding that a court-appointed lawyer has such power over the defendant, to override every institutional protection for

individuals in our government of laws, transforms the public "defender" into an agent of the state, not an agent of the accused.

In Jones v. Barnes, 463 U.S. 745, and Taylor v. Illinois, 108 S.Ct. 646, at 657 (1988) this Court recently has encircled the core question presented here: What decisions in a criminal case must be made by the defendant, personally. If this Court is serious about its dicta in Jones, Taylor, United States v. Miller, Rose v. Clark, and Henderson v. Morgan, supra, that certain defense actions are "fundamental decisions regarding the case" as to which "the accused has the ultimate authority" (Jones, supra) -- then it is time for the Court to address that recurring issue directly.

2. The court of appeals holds that a defendant's Sixth Amendment right to

counsel at sentencing is satisfied by the physical presence of a Public Defender who, at the time of sentencing, has been formally "relieved" of the duty of representation by a Court Order signed and filed prior to sentencing (App. A-3). The opinion speculates that the Public Defender "subjectively believed that she was still appellant's attorney" and concludes that such an erroneous belief coupled with physical presence constitutes legal counsel.

The holding thus raises a fundamental question about the purpose of the Sixth Amendment and the nature of legal representation that appeared to have been answered more than 50 years ago, in Powell v. Alabama, 287 U.S. 45 (1932): whether the Sixth Amendment right to counsel requires at least some attorney-client relationship, even if that relationship is

less than "meaningful." Cf., Morris v. Slappy, 103 S.Ct. 1610 (1983). Legal representation should be deemed inadequate unless it is both substantive (effective) and formal (such that a lawyer-client relationship exists).

This Court in Powell, supra, rejected a contention that substantive advice by an unappointed attorney advisor combined with inadequate representation by an appointed attorney, would suffice. More recently, this Court confirmed that the denial of the right to counsel at trial is prejudicial per se, Holloway v. Arkansas, 435 U.S. 475, 489 (1978), and is not subject to the de facto harmless error scrutiny used by the court of appeals in this case.

An accused person obtains legal counsel either through private contract (not relevant here) or Court appointment.

If the Court appointment has not occurred or has been terminated, there exists no lawyer-client relationship; in other words, there exists no attorney-client privilege (necessary for complete and effective representation), attorney-client privity (necessary to hold the attorney responsible privately for negligent conduct), or attorney-client loyalty (governed by the Code of Professional Responsibility). An unappointed Public Defender, who is a government employee, offering "informal" legal advice is not the agent of the defendant -- for the agency relationship depends upon the Court appointment creating it -- but is instead the agent of the government, which selects him, pays him, and has the power to discharge him.

The rule remains, of course, that an indigent criminal defendant is entitled to

appointed counsel at every critical stage of the prosecution, Estelle v. Smith, 451 U.S. 454, 470 (1981). Indigent federal defendants also have the mandatory right to literally-appointed counsel guaranteed by statute, 18 U.S.C. 3006 A(b). See, United States v. Wadsworth, 830 F.2d 1500, 1503 (9th Cir. 1987).

Petitioner is not aware of any post Powell v. Alabama, supra, decisions arguably on point, presumably because no jurisdiction has dared to advance the position accepted by the court of appeals. See, however, Mempa v. Rhay, 389 U.S. 128 (1967), where this Court held that formally-appointed counsel was necessary in the extended sentencing phase of the criminal prosecution. Carnley v. Cochran, 369 U.S. 506, 516 (1962), precludes finding an implied waiver of appointed Counsel from a silent record.

The Court's holding, that an indigent's Sixth Amendment right is not violated when he has no formal counsel at sentencing, because the Public Defender erroneously believed she was acting pursuant to Court appointment, should be reviewed by this Court because of the decision's potential to further blur the distinction between the Public Defender/client relationship, on one hand, necessary for our adversarial system, and the "Public Defender"/Court relationship, dominant in non-common law societies.

3. The court of appeals speculates that the Public Defender's (i) failures to object to the illegal restitution Order and to the illegal sentencing proceeding were "reasonable tactical" decisions, not ineffective (App. A-5, fn. 3); and (ii) refusal, upon specific request, to object to the prosecutor's unconstitutional use

of peremptory strikes to eliminate blacks from the jury was reasonable because Batson v. Kentucky, supra, had not yet been decided (App. A-16). Finally, the Court implicitly speculates that (iii) the Public Defender did, in fact, agree to an off-record evidentiary stipulation, when the record contains no such agreement, the government has the burden of proof, the defendant has sworn that he was aware of no such agreement, and such an agreement without the client's consent would be unethical (see, generally, ABA Model Rules of Professional Conduct, Rule 1.4 (Approved Draft, 1983) (App. A-7).[2]

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[2] Actually, the Court ignored Poole's separate argument that no on-the-record stipulation was agreed to and so none exists, just as it ignored the evidentiary hearing question and earlier failed to address any of the issues presented on direct appeal. At some point, an appellate Court's failure to address issues raised in an appeal to which the appellant has statutory guarantees raises basic Due Process questions.

The problem with these three speculations is that they are factual in nature, and material facts are genuinely disputed by Poole on the record, which is ambiguous at best; if the facts are resolved in Poole's favor, he is entitled to a new trial or new sentencing, yet the District Court denied an evidentiary hearing and wrote no opinion.

The question presented for review, therefore, is whether an appellate Court, without an evidentiary hearing, or the trial Court, after an evidentiary hearing, should resolve disputed factual issues in a habeas corpus proceeding, including the issue of whether defense counsel's repeated, prejudicial omissions were tactical or negligent and therefore ineffective. It is clear, for example, that the District Court's restitution Order and the sentencing proceeding were

illegal. See, most recently, United States v. Weichert, 836 F.2d 769, at 771 and 772 (2nd Cir. 1988) (Winter, J.) (vacating restitution order and holding sentencing proceeding illegal). Poole obviously was prejudiced by both. The alleged "tactics" involved in the Public Defender's failure to object are obscure, at best. The truth, to be demonstrated at an evidentiary hearing, is that the Public Defender made no preparation for and engaged in no conscious decision-making at Poole's sentencing because she was aware that she no longer formally represented Poole, pursuant to the District Court's earlier Order.

Moreover, the Public Defender's refusal upon Poole's request to register a 10-second objection, under Swain, to the prosecutor's misuse of his peremptory strikes in this racially-charged case

could hardly have been tactical and obviously prejudiced Poole. Compare, Jones v. Barnes, supra. Since Poole was able to cite Batson v. Kentucky on direct appeal, the existence of a Swain trial objection and consequent denial by the trial Court would have required reversal. The court of appeals, however, mysteriously cites Allen v. Hardy, 106 S.Ct. 2878 (1986), for a contrary principle, without mentioning the later and dispositive decision: Griffith v. Kentucky, 107 S.Ct. 708, 714 (1987) (See, App. A-16-17).

The Court's conclusion that an evidentiary hearing and findings by the trial court regarding the state of mind, motives, and conduct of the Public Defender were unnecessary conflicts with numerous decisions of this Court and the lower courts, including: Marchibroda v.

United States, 368 U.S. 487 (1963) (hearing must be granted unless the record conclusively shows petitioner is entitled to no relief and no material facts are genuinely disputed); Townsend v. Sain, 372 U.S. 293, 312 (1963) (same); Fontaine v. United States, 411 U.S. at 213 (1973) (same); Guice v. Fortenberry, 661 F.2d 496, 503 (5th Cir. 1981) (in banc) (same).

Finally, if the Public Defender did not, in fact, agree definitely to enter an off-record oral stipulation without petitioner's consent and without seeing the proposed stipulation reduced to writing, as Poole was (and is) prepared to prove at an evidentiary hearing, then the government simply did not prove its case. See, App. A-14-15.

The factual ambiguity concerning whether the Public Defender did consent off-the-record to an oral stipulation

(assuming arguendo she had the authority to do so) is further underscored by the recent decision in Anderegg v. High Standard, Inc., 825 F.2d 77 (1987), which holds that under long-standing common law trial practice principles, no stipulation exists unless it is reduced to writing, signed, and submitted into the record, or orally confirmed in open Court by the party sought to be bound. Anderegg, which reflects universally understood requirements, was especially brought to the Court's attention after oral argument. The government moved to strike it, but the Court issued an Order which denied that Motion. Yet the opinion below ignores Anderegg and the argument it supports.

The Court's general failure to address the denial of an evidentiary hearing, its specific failure to address Anderegg, and its repeated speculations,

are unexplained. The refusal to grant Poole an evidentiary hearing, which would focus upon the motives and conduct of the Public Defender, not only conflicts with the Due Process clause, it further flames the suspicion held by indigent criminal defendants that many Public Defenders are not "real" defense lawyers -- they are hired and shielded by the Courts. Review by this Court is necessary to insure a uniform rule of law and uniform adherence to law in habeas corpus cases.

## Conclusion

The Court should grant this Petition for a writ of certiorari.

Respectfully submitted,

James F. Ponsoldt
Attorney for Petitioner
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Athens, Georgia 30605
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Reginald Lacroix POOLE,
Petitioner-Appellant,

v.

UNITED STATES of America,
Respondent-Appellee.

Nos. 86-8649, 86-8696.

United States Court of Appeals,
Eleventh Circuit.

Nov. 19, 1987.

Appeals from the United States District Court for the Northern District of Georgia.

Before HILL and VANCE, Circuit Judges, and SPELLMAN,* District Judge.

VANCE, Circuit Judge:

*Honorable Eugene P. Spellman, U.S. District Judge for the Southern District of Florida, sitting by designation.

Reginald LaCroix Poole appeals the district court's denial of his 28 U.S.C. § 2255 motion for habeas corpus relief.[1] Appellant argues primarily that he was denied effective assistance of counsel at his trial and sentencing, and that an unconstitutional stipulation by defense counsel at trial relieved the government of the burden of proving a necessary element of the offenses charged. We disagree with both contentions and affirm the district court.

[1] Several dates are crucial in this appeal. On November 28, 1984 a jury returned guilty verdicts on four counts of bank robbery and assault. On December 3, appellant filed a motion for substitution of counsel. The district court granted

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[1]. This is appellant's second appeal to this court. On September 6, 1985 this court affirmed appellant's conviction on direct appeal in an unpublished opinion.

this motion in an order signed and filed in the clerk's office on December 27. On January 15, 1985 the district court sentenced appellant to 20 years imprisonment and ordered him to make restitution to each of the victim banks. Appellant's current counsel was appointed the next day, in an order filed in the clerk's office on January 18.

Although the district court relieved the public defender of the duty to represent appellant on December 27, 1984, the court did not appoint a substitute until January 16, 1985. Appellant thus argues that technically he had no counsel at sentencing on January 15, even though the public defender was present and actively represented appellant at the sentencing proceedings. While the unusual sequence of the proceedings below makes it appear as though appellant was

unrepresented at sentencing, a closer look at the record reveals that appellant was adequately represented by counsel at the sentencing stage.

Appellee argues that the motion for substitute counsel filed by appellant on December 3, 1984 was filed for the sole purpose of supporting appellant's effort to challenge on appeal the assistant public defender's conduct at trial, and not for the purpose of obtaining new counsel at sentencing. The record supports this explanation for the proceedings below. Appellant's December 3 motion for substitution of counsel specifically states: "Defendant brings this motion on the grounds that he wishes to raise as grounds for a new trial ineffective assistance of counsel which obviously creates a conflict of interest between this counsel and the defendant."

The district court granted this motion on December 27,[2] but was not conscious of such action at the time of sentencing.

All parties believed at the time of the sentencing hearing that the assistant public defender was still appellant's counsel. She acted like his counsel, and the district court treated her like his counsel.[3] At the very end of the hearing,

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[2] This explanation is also consistent with the district court's action of relieving the public defender "of the duty of representing defendant" on December 27, but not appointing new counsel until January 16, the day after sentencing. Because the motion for substitution of counsel was filed for purposes of trying to obtain a new trial on appeal, there was no need to appoint new counsel until after sentencing. The expectation was that the assistant public defender would remain appellant's counsel through sentencing.

[3] Appellant argues in the alternative that counsel's representation at sentencing was ineffective because she failed to object to the allegedly deficient sentencing record and to the allegedly improper restitution order. After reviewing the transcript of the sentencing proceeding, we believe that the

after the court informed appellant that his attorney could help him file an appeal,[4] the assistant public defender stated: "Your honor, I have a motion to withdraw as counsel pending." Thus the assistant public defender did not know the status of appellant's motion to substitute counsel, and subjectively believed that she was still appellant's attorney.[5]

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assistant public defender's actions were reasonable tactical decisions, and fell far short of the Strickland standard for ineffective assistance of counsel. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

[4] The court was referring presumably to the assistant public defender, since she was the only defense attorney present, and the court made no reference to any other attorney.

[5] The assistant public defender continued to believe she represented appellant as late as January 17, 1985, when she signed a notice of appeal to the Eleventh Circuit. Appellant's substitute and current counsel apparently also believed that the assistant public defender continued to represent appellant as of January 17. The Notice of Appeal contains the names of both lawyers as

Under these conditions, we hold that appellant was represented by counsel at sentencing.

[2] Appellant also contends that by stipulating at trial to the federally insured status of the banks, the assistant public defender committed a breach of trust and relieved the government of the burden of proving an essential element of the offense charged without appellant's consent. In essence, appellant argues that any stipulation by a defense attorney that waives the government's burden of proving an element of the offense, and thus waives a defendant's right to a jury trial on that element of the offense, regardless of the element, is not a strategic decision and cannot be waived by

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"Attorney for Mr. Poole," and the signature of appellant's substitute counsel is in the public defender's handwriting "with permission."

counsel alone.

This is clearly not the law.[6] Courts

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[6] Pressed for authority for this proposition, counsel for appellant cites language in Justice White's concurring opinion in Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976). In that case, Justice White, joined by three other justices, wrote:

> It should hardly need saying that a judgment of conviction cannot be entered against a defendant no matter how strong the evidence is against him, unless that evidence has been presented to a jury (or a judge, if a jury is waived) and unless the jury (or judge) finds from that evidence that the defendant's guilt has been proved beyond a reasonable doubt. It cannot be "harmless error" wholly to deny a defendant a jury trial on one or all elements of the offense with which he is charged. Similarly, it is too late in the day to permit a guilty plea to be entered against a defendant solely on the consent of the defendant's agent -- his lawyer.

Id. at 650, 96 S.Ct. at 2260 (White, J., concurring). We note that Morgan involved the issue of whether the defendant entered a voluntary guilty pleas when he was not informed that intent to cause death was an element of the offense charged. Poole's appeal does not involve a guilty plea, nor can it be said that appellant did not know the elements of the offense charged. Cf. id. at 649-50 & n. 2, 96 S.Ct. at 2260 &

have allowed defense attorneys to make certain types of stipulations without the defendant's consent, but in other situations have required the defendant personally to make the stipulation or waive the right in question. At one end of the spectrum, there are certain rights that cannot be waived absent a constitutionally voluntary waiver. The easiest case involves guilty pleas, where the trial judge cannot accept a plea of guilty without "an affirmative showing that it was intelligent and voluntary." Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709. 1711, 23 L.Ed.2d 274 (1969); see Henderson v. Morgan, 426 U.S. 637, 644-45, 96 S.Ct. 2253, 2257, 49 L.Ed.2d 108 (1976). For this reason a guilty plea

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n. 2 (White, J., concurring). We believe Justice White's language, taken in context, does not support appellant's position.

cannot be entered against a defendant "solely on the consent of the defendant's agent -- his lawyer." Id. at 650, 96 S.Ct. at 2260 (White, J., concurring).

At the other end of the spectrum, some rights are waived routinely by defense attorneys without the defendant's consent. Each and every time a defense attorney declines to cross-examine a witness, the attorney technically waives his client's sixth amendment right. The ability of defense attorneys to elect without the defendant's consent not to conduct a cross-examination of a witness has never been questioned.

Between these two extremes, but closer to the waivability of the defendant's cross-examination right, it is well established in this circuit that a defense attorney can stipulate to the replacement of a juror without the

defendant's consent, even though erroneous replacement of a juror may deprive the defendant of certain constitutional rights. See Peek v. Kemp, 784 F.2d 1479, 1482-84 (11th Cir.) (en banc), cert. denied, ___ U.S. ___, 107 S.Ct. 421, 93 L.Ed.2d 371 (1986); United States v. Stewart, 700 F.2d 702, 704-05 (11th Cir. 1983); United States v. Spiegel, 604 F.2d 961, 965 & N. 9 (5th Cir. 1979), cert. denied, 446 U.S. 935, 100 S.Ct. 2151, 64 L.Ed.2d 787 (1980). Whether the defense attorney can waive the defendant's right to be present at all stages of a criminal trial falls toward the center of the spectrum, and has not been resolved firmly in this circuit. See, e.g., Proffitt v. Wainwright, 706 F.2d 311, 312 & N. 46 (11th Cir. 1983), modifying on reh'g 685 F.2d 1227 (11th Cir. 1982) (not deciding whether presence is waivable by defense

attorney), cert. denied, 464 U.S. 1002, 104 S.Ct. 508, 78 L.Ed.2d 697 (1983); Hall v. Wainwright, 733 F.2d 766, 775-76 (11th Cir. 1984) (remand for further development of record regarding waiver of right to be present), cert. denied, 471 U.S. 1107, 105 S.Ct. 2344, 85 L.Ed.2d 858 (1985); id. at 780-85 (Hill, J., concurring) (arguing that Proffit should be interpreted to hold that a defendant may waive his right to presence); see also Illinois v. Allen, 397 U.S. 337, 343, 90 S.Ct. 1057, 1060, 25 L.Ed.2d 353 (1970) (defendant can lose right to be present at trial by disruptive behavior).

It is difficult to articulate a bright line distinction between those rights an attorney can waive without the defendant's consent and those the attorney cannot waive. Case law in this circuit suggests that where a defense attorney

"makes a tactical decision with constitutional implications," a stipulation does not require the defendant's consent. See Stewart, 700 F.2d at 704. Where an "inherently personal right of fundamental importance is involved," however, the defendant's consent is required. See Spiegel, 604 F.2d at 965 n. 9 (quoting Winters v. Cook, 489 F.2d 174, 178 (5th Cir. 1973)). We believe the decision to stipulate to the insured status of the banks is more a tactical decision than an infringement on an "inherently personal right of fundamental importance." Id. It is often wise for counsel to stipulate to such trivial and easily proven matters as to whether banks were federally insured at the time of the robbery. Courts have even encouraged such stipulations. See e.g., United States v. Sliker, 751 F.2d 477, 484

& n. 3 (2nd Cir. 1984), cert. denied, 470 U.S. 1058, 105 S.Ct. 1772, 84 L.Ed.2d 832 (1985); United States v. Schoenhut, 576 F.2d 1010, 1019 & n. 9 (3rd Cir.), cert. denied, 439 U.S. 964, 99 S.Ct. 450, 58 L.Ed.2d 421 (1978). We hold therefore that counsel for the defendant can stipulate to the insured status of the banks without a formal waiver by the defendant.

The Fifth Circuit cases cited by appellant are inapposite. The Fifth Circuit has held that proof of federally insured status is not a mere formality and is an essential element of the federal offense charged. See United States v. Rangel, 728 F.2d 675, 676 (5th Cir.), cert. denied, 467 U.S. 1230, 104 S.Ct. 2689, 81 L.Ed.2d 883 (1984); United States v. Trevino, 720 F.2d 395, 399 (5th Cir. 1983); United States v. Platenburg, 657

F.2d 797, 799 (5th Cir. Unit A 1981); see also United States v. Bolt, 776 F.2d 1463, 1471 (10th Cir. 1985). The Fifth Circuit has also noted the "extremely lax" treatment prosecutors have accorded this element. Platenburg, 657 F.2d at 799; United States v. Maner, 611 F.2d 107, 112 (5th Cir. 1980). All of these cases, however, involve the sufficiency of the government's proof of FDIC insured status. In this case, counsel for appellant stipulated to the federally insured status of the four banks, so the government never needed to present any evidence of the banks' insured status. In such a case, the defendant cannot accuse the government of failing to prove that the banks were federally insured.[7]

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[7] In Rangel, defense counsel conceded during argument that the victim credit union was federally insured. The only evidence was a single statement by a witness that the credit union was

[3] Finally, appellant raises a claim of ineffective assistance of counsel at the trial. Appellant makes numerous allegations of deficient representation, none of which has merit. Specifically, appellant argues that counsel at trial was ineffective for failing to object to the government's use of peremptory strikes to eliminate blacks from the jury, a practice declared unconstitutional in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

The problem with faulting the public defender for failing to raise a Batson objection at trial is that Batson had not been decided yet. The Supreme Court has held that "Batson v. Kentucky is an explicit and substantial break with prior precedent," Allen v. Hardy, ___ U.S. ___,

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federally insured. The conviction was affirmed. See 728 F.2d at 676.

106 S.Ct. 2878, 2880, 92 L.Ed.2d 199 (1986), so that "the rule in Batson should not be available to petitioner on federal habeas corpus review of his convictions." Id. at ___, 106 S.Ct. at 2881; see also Lindsey v. Smith, 820 F.2d 1137, 1145-46 (11th Cir. 1987) (Allen v. Hardy bar to raising Batson claims in federal habeas corpus proceedings applies to sixth amendment claims as well as equal protection claims). Thus appellant cannot raise this claim in his collateral attack, and, in any event, the public defender's performance was in no way ineffective by failing to raise a Batson objection.

Appellant's other claims of ineffective assistance of counsel are groundless, and do not merit discussion. The district court's denial of appellant's motion for habeas relief pursuant to 28 U.S.C. § 2255 is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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Nos. 86-8649 & 86-8696

D.C. Docket No. 84-265

REGINALD L. POOLE,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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Appeals from the United States District Court for the Northern District of Georgia

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Before HILL and VANCE, Circuit Judges, and SPELLMAN*, District Judge.

J U D G M E N T

These causes came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and were argued by counsel;

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*Honorable Eugene P. Spellman, U.S. District Judge for the Southern District of Florida, sitting by designation.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the orders of the District Court appealed from, in these causes be and the same are hereby, AFFIRMED.

Entered: November 19, 1987

For the Court: Miguel J. Cortez, Clerk

By _____

Deputy Clerk

ISSUED AS MANDATE -- FEB 5, 1988

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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Nos. 86-8649 & 86-8696

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REGINALD LACROIX POOLE,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

---

Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION FOR REHEARING AND SUGGESTION

OF REHEARING IN BANC

(Opinion November 19, 11 Cir., 1987, F.2d ).

(January 13, 1988)

Before HILL and VANCE, Circuit Judges, and SPELLMAN*, District Judge.

*Honorable Eugene P. Spellman, U.S. District Judge for the Southern District of Florida, sitting by designation.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

Robert Vance
United States Circuit Judge

ORD-41

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

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| UNITED STATES OF AMERICA | ) | |
| | ) | |
| v. | ) | CR84-265A |
| | ) | |
| REGINALD L. POOLE | ) | |

ORDER

Defendant's motion to proceed in forma pauperis is DENIED as legally frivolous; his motions for appointment of counsel and to vacate sentence are DENIED.

SO ORDERED, this 31 day of March, 1986.

Charles A. Moye, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

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| UNITED STATES OF AMERICA | ) | |
| | ) | |
| v. | ) | CR84-265-01A |
| | ) | |
| REGINALD LACROIX POOLE | ) | |

ORDER

Defendant's motions for appointment of counsel, to appeal in forma pauperis, to vacate, set aside and/or correct sentence, and for reconsideration are hereby DENIED.

SO ORDERED, this 2 day of September, 1986.

Charles A. Moye, Jr.
UNITED STATES DISTRICT JUDGE

EXCERPTS FROM JURY INSTRUCTIONS
R. III-254

Now, many of these essential elements are not in issue in this trial. First, the locations of the banks involved are within the Northern District of Georgia as alleged, and the Court will take judicial notice of that fact and no evidence is required. Secondly, it is stipulated that the banks were banks operating under the laws of the United States, and member banks of the FDIC and SLIC; and, third, that on the dates, approximately times named, money belonging to or in the care, custody, control, and management or possession of the banks was actually taken by someone by force or violence or by intimidation, which leaves for your consideration two contested issues.